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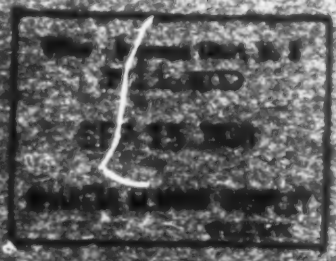

No. 220

# In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION**

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**ANDUM FOR THE NATIONAL LABOR RELATIONS D IN REPLY TO RESPONDENT'S BRIEF IN SITION**

brief filed by respondent in opposition to tition for certiorari in the instant case raises ew issues and contains several statements should not be allowed to pass unchallenged.

## I

court below held, we believe incorrectly pp. 22–23), that the strike called by the was a breach of the contract provision for- g a stoppage of work during arbitration. ndent now attempts to establish that the

28—38

strike breached the contract in a wholly different respect, in that it was a strike for a closed shop, whereas the contract expressly provided for an open shop. Respondent now claims that (Br. in opp., p. 5)—

> the only real dispute between the Union and the respondent was on the basis of the closed shop. Time after time commencing with the negotiation of the Indianapolis Agreement and throughout the period of the agreement preceding the strike, the question of the closed shop was raised.

These statements, we submit, are not supported by the record. On the contrary, the record shows that although the Union had between July 1934 and November 1934 expressed a desire for a closed shop, it did not incorporate such a request in the proposals of January 4, 1935, which led directly to the controversy involved in this case, and that between the end of November 1934 and the resolution of March 17, 1935, no such demands were made.[1] Not until respondent had refused to arbitrate the proposals made by the Union on January 4 and thereby, according to the Union, had itself

[1] The detailed record showing is as follows: Just before the 1934 agreement was signed, the Union Scale committee disclaimed the remark of one of its members that she would not work with a "scab" (R. 187). Thereafter there were meetings between the Scale committee and respondent's officials on August 8, August 30, September 5, and September 21, 1934, but the closed shop issue was not raised at any of them (R. 120–122, 188–191). At a further meeting on November 26, 1934, a representative of the Union stated

first broken the agreement, did the Union, on March 17, express its desire for a closed shop. The Union's resolution of that date, which constituted an announcement of the strike and recited the grievances impelling the Union's decision, represents in substance a rescission of the 1934 agreement on the ground of the respondent's prior violation. Under these circumstances the Union can scarcely be charged with a breach of contract in advancing the closed shop issue at that time, nor is there any support for such a claim in the decision of the court below.

Respondent raises a second new issue in contending that even if the strikers were employees within the meaning of the Act on July 23, it did not violate Section 8 (5) in refusing to meet with their representatives on that date. Specifically, respondent claims that the closed shop was "the only real issue" ever existing between it and the Union; that an impasse on that subject had prevailed throughout the period from July 1934 to March 1935; and

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that it "would like to have" a closed shop (R. 199), but promptly withdrew the request upon its rejection by respondent (R. 199–201). Matters remained in that situation until the Union's resolution of March 17 declaring the strike described in the text.

Respondent seeks to establish such a demand by implication in a proposal that it lay off "any employee" suspended from the Union (Brief in opposition, p. 6). The proposal actually made did not contain the phrase used by respondent, but only requested the laying off of "any member of the Union who becomes suspended," not any "employee" (Resp. Ex. 1). This obviously is not a request for a closed shop.

that no occasion for further negotiations existed on July 23 since the Union had renewed the closed-shop proposal at the June 11 meeting (Brief in opposition, pp. 8–9).

Respondent's assertions are faulty in point of fact, for, as pointed out above, the closed shop was not the real issue, and was not the source of any impasse in the negotiations preceding the strike. Respondent is further in error in suggesting that efforts to settle the strike on June 11 were unsuccessful because of the Union's renewal then of the closed-shop demand. While the closed shop was discussed at that meeting (at whose instance respondent's president could not remember) (R. 301), the actual barrier to any settlement of the strike on that occasion was respondent's insistence that it would reopen the plant only "as an open shop without union recognition or agreement" (Petition, p. 8). In such circumstances, respondent cannot assert that its refusal to meet with the Union on July 23 was based upon any earlier impasse over the closed shop. The flat statement of respondent's president to the Department of Labor conciliator that "I would not have any meeting with him or with the Scale Committee" (R. 305), plainly foreclosed negotiations upon any and all subjects, including the Union's principal proposals of January 4.

In any event, circumstances had so changed by July 23 that regardless of the nature and outcome of the earlier negotiations respondent was obli-

gated to respond to the overtures then made by the conciliators in behalf of the Union. Nearly 6 weeks had passed since the June 11 meeting; martial law had been declared and picketing had been forbidden; the plant had reopened; and respondent was attempting to enlist a full working force. The fact that the Union on July 23 approached respondent through conciliators—persons primarily interested in composing and compromising differences—is significant that it was in a conciliatory frame of mind and that negotiations, if then undertaken, promised every hope of a peaceful settlement. A decision of the Fourth Circuit is directly in point. *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134, certiorari denied, 302 U. S. 731.

## II

Respondent attempts to avoid the conflict with the decision in *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862 (C. C. A. 2d) by stating that the alleged misconduct of the employees in that case did not precede but followed the commission of the employer's unfair labor practices. The two cases are not so distinguishable. In the *Remington Rand* case, the company placed considerable emphasis in the Circuit Court of Appeals and in this Court on the fact that the employees' misconduct preceded the unfair labor practice. See Remington Rand's brief in C. C. A., pp. 13, 35–36; Petition, No. 970, October Term, 1937, pp.

21–22. Moreover, it is plain from the opinion that the court assumed that the alleged misconduct preceded the commission of the unfair labor practices, for it said (94 F. (2d) at p. 873)—

> though the union may have misconducted itself, it has a locus poenitentiae; if it offers in good faith to treat, the employer may not refuse because of its past sins.

## III

Respondent contends (Brief in opposition, p. 12) that the Board's order in question is invalid under the decision of this Court in *National Labor Relations Board* v. *Mackay Radio and Telegraph Company,* 304 U. S. 333. Respondent seems to understand the *Mackay* case to hold that an employer, under any and all circumstances, is entitled "to protect and continue his business by supplying places left vacant by strikers." In quoting from this Court's opinion, respondent ignores the vital qualifying phrase in the same sentence limiting this right to employers "guilty of no act denounced by the statute." See 304 U. S. at p. 345.[2] Respondent

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[2] Respondent does equal violence to the decision of the Second Circuit in the *Black Diamond* case (94 F. (2d) 875, cert. denied May 23, 1938). In approving the order of reinstatement of the strikers in that case the court was careful to point out (p. 879):

"From the date of the respondent's first unfair practice, its ordinary right to select its employees became vulnerable. Accordingly it was proper for the Board to order it to discharge all engineers hired for the first time since December 14, 1936 [the date of the refusal to bargain] * * *.

here did not begin to replace the strikers until July 23, and it was immediately following that date that the unfair labor practice—refusing to meet with the conciliators and the representatives of the Union—was committed. Not until September, long after the unfair labor practice, did respondent have a full staff of employees.

Respondent states that on June 11, 1935, all of the former employees "were offered their jobs back without discrimination and without reference to their participation in the strike" (Brief in opposition, p. 12). Respondent fails to state that this offer was made with the express reservation that it was to be "without recognition of the union" (R. 301), which at the time represented substantially all of respondent's employees.

Respectfully submitted.

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CHARLES FAHY,
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SEPTEMBER, 1938.

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